U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13072977

Date: APR. 14, 2021

Motions on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, an exporter and distributor of used clothing, seeks to employ the Beneficiary as a management analyst. The company requests his classification under the second-preference, immigrant category for members of the professions holding advanced degrees or their equivalents. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

After the Director of the Texas Service Center denied the petition, we dismissed the Petitioner's following appeal. *See In re: 1857314* (AAO Jun. 23, 2020). Agreeing with the Director, we concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum employment experience required for the offered position or the requested immigrant visa classification. *Id.* We also found insufficient evidence of the position's need for an advanced degree professional. *Id.*

The matter is again before us on the Petitioner's combined motions to reopen and reconsider. Upon review, we will dismiss the motions.

I. MOTION CRITERIA

A motion to reopen must state new facts supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). In contrast, a motion to reconsider must establish a prior decision's misapplication of law or U.S. Citizenship and Immigration Services (USCIS) policy based on the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant motions that meet these requirements and demonstrate petitions' approvability.

II. THE REQUIRED EXPERIENCE

To establish the Beneficiary's qualifications for the offered position and the requested immigrant visa classification, the Petitioner must demonstrate that, by the petition's priority date of December 1, 2010, the Beneficiary gained at least five years of full-time, post-baccalaureate, business-related experience. *See* 8 C.F.R. § 204.5(k)(2) (defining the equivalent of an "advanced degree" as a baccalaureate followed by at least five years of progressive experience in the specialty); *see also Matter of Wing's*

Tea House, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977) (requiring petitioners to demonstrate beneficiaries' qualifications by the priority dates of their respective petitions).

The Petitioner asserts that the Beneficiary gained about 14 months of qualifying experience in Pakistan, from June 2000 to August 2001. Our appellate decision does not credit the claimed, post-baccalaureate nature of the foreign experience. Rather, we found that the Petitioner did not demonstrate the Beneficiary's attainment of the foreign equivalent of a U.S. bachelor's degree before a Pakistani university issued his master-of-commerce diploma on August 20, 2001.

On motion, the Petitioner submits a copy of a "provisional certificate" from the university regarding the Beneficiary's master-of-commerce studies. The company argues that the provisional certificate demonstrates the Beneficiary's possession of the equivalent of a bachelor's degree upon the certificate's issuance on May 23, 2000.

To establish a beneficiary's possession of a degree before the issuance of a corresponding diploma, a petitioner must demonstrate that, before the diploma's issuance, the noncitizen completed all substantive, degree requirements and the applicable school approved the degree's award. *Matter of O-A-, Inc.*, Adopted Decision 2017-03 (AAO Apr. 17, 2017). Consistent with *O-A-*, the provisional certificate submitted by the Petitioner indicates the Beneficiary's completion of all requirements for his master-of-commerce degree and the university's approval of the degree's issuance by May 23, 2000. Also, information on the provisional certificate - including the Beneficiary's class roll and enrollment numbers - matches the same information on originals of the Beneficiary's university documents, which the Petitioner previously provided. The copy of the provisional certificate therefore establishes the Beneficiary's possession of 14 months of qualifying, post-baccalaureate experience in Pakistan.

The Petitioner, however, must demonstrate the Beneficiary's possession of at least an additional 46 months of qualifying experience. The Petitioner claimed that a shipping supplier employed the Beneficiary full-time in the United States for about 56 months, from May 2005 to January 2010. We found insufficient evidence of his continuous, full-time employment during that period. Copies of the Beneficiary's federal income tax returns and IRS Forms W-2, Wage and Tax Statements, suggest that he worked for his former U.S. employer from May 2005 to December 2006 on only a part-time basis. *See Matter of Cable Television Labs., Inc.*, 2012-PER-00449 (BALCA Oct. 23, 2014) (finding that, for labor certification purposes, part-time employment equals only half the amount of full-time work). While payroll records show that the company annually paid the Beneficiary at least $30,534 in 2007, 2008, and 2009, his tax returns and Forms W-2 indicate his receipt of company wages of only $11,340.80 in 2005 and $11,473.50 in 2006.

On motion, the Petitioner argues that it has demonstrated the Beneficiary's possession of an additional 50 months of full-time, qualifying experience in the United States. Noting that our appellate decision does not question the Beneficiary's qualifying experience during the 36-month period from January 2007 through January 2010, the Petitioner argues that it need only demonstrate the Beneficiary's possession of an additional 10 months of qualifying experience. We found that the Beneficiary worked part-time from May 2005 through December 2006. Thus, the Petitioner asserts that, consistent with *Cable Television Laboratories*, this 20-month period of part-time employment equates to 10 months

of full-time employment, qualifying the Beneficiary for the offered position and the requested immigrant visa classification.

Our appellate decision, however, also noted the Beneficiary's attestation on a prior application for labor certification that he did not work from May 2006 to October 2006. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). We therefore did not credit the Beneficiary's claimed, continuous, full-time employment from May 2005 through December 2006. Rather, we credited his part-time employment from May 2005 to May 2006 and from October 2006 through December 2006. Thus, we found that, from May 2005 through December 2006, the Petitioner demonstrated the Beneficiary's possession of only about 15 months of part-time employment, or about eight months of additional, full-time, qualifying experience, two months less than required for the offered position and the requested immigrant visa classification.

The Petitioner asserts that it previously submitted "several affidavits and records establishing [the Beneficiary's] full-time employment with the U.S. employer from May 2005 to January 2010 with no gaps in between." The company therefore argues that a preponderance of evidence establishes the Beneficiary's qualifying experience.

The record contains two letters and an affidavit from the president of the Beneficiary's former U.S. employer. As the Petitioner argues, these documents state the company's continuous, full-time employment of the Beneficiary from May 2005 to January 2010. But the Petitioner has not corroborated the documents' statements with additional evidence. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring petitioners to resolve inconsistencies with independent, objective evidence). Affidavits from former coworkers of the Beneficiary do not confirm the statements of the employer's president.[1] Of the five affidavits submitted, two state that the Beneficiary began work for his former U.S. employer in May 2005. But none of the documents indicate how long the company employed him or whether he worked for the company continuously.

Also, in an affidavit, the president of the Beneficiary's former employer stated that the company "directly" paid the Beneficiary from May 9, 2005, through December 20, 2005, before placing him on its payroll on December 21, 2005. The record, however, lacks corroborating evidence of the company's purported, "direct" payments to the Beneficiary from May 2005 to December 2005. The Petitioner also has not explained whether the $11,340.80 wage amount on the Beneficiary's Form W-2 for 2005 reflects compensation for work performed after his listing on the company payroll on December 21, 2005, or for work earlier in the year.

Further, the Beneficiary's own statements cast doubt on his claimed, full-time, continuous employment from May 2005 through December 2006. On the prior labor certification application, he attested to his unemployment from May 2006 to October 2006. The Beneficiary's former U.S. employer filed the application for the Beneficiary in October 2007, while the Beneficiary still worked for the company. Memories tend to fade over time. The information on the prior labor certification application should therefore more accurately describe the Beneficiary's employment history at his former employer than his more recent claims of continuous employment. Also, in an affidavit, the

[1] Payroll evidence of record confirms all but one of the five affiants as former co-workers of the Beneficiary.

Beneficiary stated that, while working for his former U.S. employer, he was "offered a full-time job" by the company. The reference to this later, "full-time" job offer suggests that he initially worked for the company on only a part-time basis. The Petitioner's motions do not resolve these inconsistencies of record.

The Petitioner notes that, as part of the Beneficiary's "optional practical training" (OPT) in U.S. nonimmigrant, student visa status, USCIS granted the Beneficiary permission to work in the United States for one year, from May 2005 to May 2006. *See* 8 C.F.R. § 214.2(f)(10(ii)(A) (authorizing eligible foreign students to engage in work related to their fields of study). Counsel asserts that foreign students granted OPT "are usually paid less and are often referred to as 'temporary' by employers."

Counsel's assertions, however, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). The Petitioner must substantiate counsel's statements with independent evidence, which may include affidavits and declarations. Also, even if the Beneficiary's former U.S. employer paid him less money and considered him to be a "temporary" employee during his OPT period, the Petitioner has not explained the Beneficiary's inconsistent descriptions of his employment status from May 2006 to October 2006, or submitted sufficient, corroborating evidence of his purported, continuous, full-time work from May 2005 through December 2006.

The Petitioner provides financial evidence regarding the Beneficiary's former employer and states that the employer's assets and revenues "dramatically increased" from 2004 to 2007. The Petitioner argues that the increases allowed the Beneficiary's former employer, in 2007, to pay the Beneficiary more and to offer him a "permanent" job.

But any financial limitations on the Beneficiary's former employer before 2007 would not excuse the Petitioner from demonstrating the Beneficiary's possession of at least five years of post-baccalaureate experience for the offered position and the requested immigrant visa classification. *See, e.g.,* 8 C.F.R. § 204.5(k)(3) (requiring a petitioner for an advanced degree professional to submit documenting showing a beneficiary's possession of an advanced degree or its equivalent). The Petitioner must explain the Beneficiary's inconsistent statements regarding his employment status from May 2006 to October 2006 and provide additional evidence of his purported, full-time, continuous work from May 2005 through December 2006.[2]

For the foregoing reasons, the Petitioner has not demonstrated the Beneficiary's possession of the minimum employment experience required for the offered position or the requested immigrant visa classification.

[2] It's unclear whether the Petitioner asserts that the Beneficiary's former employer did not pay him for all work he performed from May 2005 through December 2006. If so, unpaid experience can be qualifying experience. *Matter of B&B Residential Facility*, 01-INA-146, slip op. at *3 (BALCA July 16, 2002). But unpaid experience "may be difficult to document." *Id.*

III. THE JOB'S NEED FOR AN ADVANCED DEGREE PROFESSIONAL

A labor certification accompanying a petition under the requested immigrant visa classification "must demonstrate that the job requires a professional holding an advanced degree or the equivalent." 8 C.F.R. § 204.5(k)(4)(i). The term "advanced degree" means:

> any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

On appeal, we found that the labor certification accompanying this petition does not demonstrate the job's need for an advanced degree professional. The labor certification states that the offered position of management analyst requires either a U.S. master's degree (or a foreign equivalent degree) in business administration with no experience, or a U.S. bachelor's degree (or a foreign equivalent degree) followed by five years of experience. Also, part H.14 of the certification, "Specific skills or other requirements," states: "Will accept a Bachelor's equivalent based on a combination of education as determined by a professional evaluation service."

To qualify as an advanced degree professional, a beneficiary relying on foreign education must have a single, foreign degree that equates to at least a U.S. baccalaureate. The regulations do not allow baccalaureate equivalents based on combinations of lesser educational credentials or of education and experience. *See* Final Rule for Employment-Based Immigrant Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (stating that "both the Act and its legislative history make clear that, in order to ... have experience equating to an advanced degree under the second [preference category], *an alien must have at least a bachelor's degree*") (emphasis added).

The Petitioner documented that the Pakistani university issued the Beneficiary a two-year bachelor's degree and a two-year master's degree. The company submitted an independent, professional evaluation concluding that the Beneficiary's foreign educational credentials equate to a U.S. bachelor's degree.

The labor certification accompanying the petition states the Petitioner's acceptance of the equivalent of a bachelor's degree "based on a combination of education as determined by a professional evaluation service." Contrary to the Act and its legislative history, this statement allows a candidate with less than a bachelor's degree to combine educational credentials to equal a baccalaureate and thereby qualify for the offered position. We therefore found that the position does not require a single degree equating to at least a bachelor's degree.

On motion, the Petitioner submits an affidavit from its president. The president states: "The 'combination' on the [Labor] Certification means that a foreign bachelor's degree and foreign master's degree can be combined to a U.S. equivalent bachelor's degree, only after it is properly evaluated by a professional evaluation service." Thus, the Petitioner argues that, by listing its acceptance of a combination of education in part H.14 of the labor certification, the company sought only to confirm its

acceptance of a combination of foreign bachelor's and master's degrees equating to a U.S. bachelor's degree.

In determining the minimum requirements of an offered position, however, the plain language on a labor certification generally binds USCIS. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "it is the language of the labor certification job requirements that will set the bounds of the alien's burden of proof"); *see also Rosedale & Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (stating that "[t]he Court - like the [immigration service] - must examine the certified job offer exactly as it was completed by the prospective employer"). On the labor certification, the Petitioner stated its acceptance of "a combination of education." That language does not limit the company's acceptance to foreign baccalaureate and master's degrees. Rather, the language allows a combination of *any* educational credentials, including those less than bachelor's degrees.

We agree with the Petitioner that, for purposes of qualifying as an advanced degree professional, a foreign master's degree that follows a foreign baccalaureate may equate to a U.S. bachelor's degree. In some countries, bachelor's degrees do not require four years of university studies as U.S. baccalaureates usually do. *See Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977). A foreign master's degree following a two- or three-year, foreign bachelor's degree equates to a U.S. baccalaureate if the single, master's degree equals at least a U.S. bachelor's degree. The Petitioner's statement in part H.14 of the labor certification, however, broadly allows a combination of any educational credentials, not just foreign baccalaureates and master's degrees. Thus, by its plain language, part H.14 of the labor certification indicates that the offered position does not require an advanced degree professional.

The affidavit from the Petitioner's president cites the company's efforts to recruit U.S. workers during the labor certification process. The president stated: "All of the job postings for the Labor Certification required the prospective job applicants to either have an "MBA [master of business administration] or BBA [bachelor of business administration] plus 5 yrs. Exp.'" The Petitioner submits copies of advertisements for the offered position that the company placed in newspapers and on an online, job-search website. The Petitioner appears to argue that it intended the language in part H.14 of the labor certification to allow only combinations of foreign baccalaureate and master's degrees to equate to U.S. baccalaureates.

The president's statement and the copies of the ads, however, do not specifically support the Petitioner's claimed acceptance of baccalaureate equivalencies based only on combinations of foreign master's and bachelor's degrees. The materials do not indicate, for example, the company's rejection of job applicants with baccalaureate equivalencies based on combinations of lesser educational credentials. The materials therefore do not demonstrate the Petitioner's intention to allow only combinations of foreign baccalaureate and master's degrees as U.S. baccalaureate equivalencies.

For the foregoing reasons, the Petitioner has not demonstrated the offered position's need for an advanced degree professional.

IV. CONCLUSION

The Petitioner's motions neither demonstrate our prior decision's misapplication of law or USCIS policy nor the petition's approvability. We will therefore affirm the appeal's dismissal.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.